Nasioncom Holdings Bhd v Suruhanjaya Sekuriti

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–70 OF 2007
LAU BEE LAN J
13 NOVEMBER 2007

Civil Procedure — Judicial review — Stay of proceedings pending judicial review — Whether discretionary power of court — Whether proved special circumstances warranting stay

Nasioncom Holdings Sdn Bhd ('the applicant'), an investment holding company with subsidiaries, namely, Nasioncom Sdn Bhd and Express Top Up Sdn Bhd ('ETU'), issued its first annual report for the financial year ended 31 December 2005 accompanied by the financial statements of the group and the company. The respondent was dissatisfied with the explanation proffered by the applicant with respect to the amounts of revenue generated by ETU and Nasioncom Sdn Bhd alleging them to be false and subsequently imposed two sanctions. Dissatisfied, the applicant, by an application for judicial review under O 53 of the Rules of the High Court 1980, sought leave for reliefs, inter alia, a writ of certiorari to quash the decision of the respondent in imposing a public reprimand ('first sanction') and to direct the applicant to rectify and reissue the applicant's 2005 financial statements by excluding the sum of RM143,109,727 from the group revenue of RM194,948,186 ('second sanction'); an interim stay order of the two sanctions which the respondent imposed till the final determination of the ex parte application or of the substantive application; and a declaration that the respondent had acted with mala fides and/or abuse of the authority and/or did not act with fairness and was unreasonable and/or the respondent was biased and acted in contravention of the basic rights of the applicant. The respondent opposed to the application of the interim stay order, the subject matter of the instant proceeding. On the other hand, the applicant urged the court to grant the interim stay principally on the ground that there were special circumstances.

Held, allowing the application for stay of the second sanction only:

It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion. Consequently, as to properly exercise the discretion, the court would need to consider whether there were special circumstances which warranted a stay of the proceedings. In the instant case, the applicant

had shown that there were special circumstances which warranted a stay of the proceedings. However, it would only apply to the second sanction but not to the first sanction which had already been carried out and there was no further purpose to be achieved if a stay was granted (see paras 16–17 & 20).

[Bahasa Malaysia summary

Nasioncom Holdings Sdn Bhd ('pemohon'), sebuah syarikat pegangan pelaburan dengan anak-anak syarikatnya, iaitu, Nasioncom Sdn Bhd and Express Top Up Sdn Bhd ('ETU'), mengeluarkan laporan tahunan pertamanya bagi tahun kewangan yang berakhir pada 31 Disember 2005 bersama-sama dengan penyata kewangan kumpulan dan syarikat tersebut. Responden tidak puas hati dengan penjelasan yang diberikan oleh pemohon berkenaan dengan jumlah hasil yang diperolehi oleh ETU dan Nasioncom Sdn Bhd dengan dakwaan bahawa ianya salah dan kemudian mengenakan dua sanksi. Pemohon yang tidak puas hati, melalui satu permohonan untuk semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980, memohon kebenaran untuk relief-relief, antara lain, writ certiorari untuk membatalkan keputusan responden dalam mengenakan teguran awam ('sanksi pertama') dan mengarahkan pemohon untuk membetulkan dan mengeluarkan penyata kewangan 2005 pemohon dengan mengecualikan jumlah RM143,109,727 daripada hasil kumpulan sebanyak RM194,948,186 ('sanksi kedua'); perintah penggantungan interim kedua-dua sanksi tersebut yang responden kenakan sehingga pemutusan muktamad permohonan ex-parte atau permohonan substantif; dan deklarasi bahawa responden telah bertindak secara niat jahat dan/atau salah guna kuasa dan/atau tidak bertindak secara adil dan tidak munasabah dan/atau responden berat sebelah dan bertindak bertentangan dengan hak asasi pemohon. Responden menentang permohonan untuk perintah penggantungan interim tersebut, perkara utama prosiding ini. Pemohon sebaliknya mendesak mahkamah untuk memberikan penggantungan interim, pada asasnya, atas alasan bahawa terdapat hal keadaan istimewa.

Diputuskan, membenarkan permohonan untuk penggantungan sanksi kedua sahaja:

Adalah nyata bahawa pemberian kebenaran dalam prosiding semakan kehakiman adalah pelaksanaan budi bicara mahkamah. Oleh yang demikian, untuk melaksanakan budi bicara tersebut dengan sewajarnya, mahkamah perlu mempertimbangkan sama ada terdapat hal keadaan istimewa yang mewajarkan penggantungan prosiding tersebut. Di dalam kes ini, pemohon telah menunjukkan bahawa terdapat hal keadaan istimewa yang mewajarkan penggantungan prosiding tersebut. Walau bagaimanapun, ia hanya beraplikasi kepada sanksi kedua tetapi bukan kepada sanksi pertama yang

telahpun dilaksanakan dan tidak ada tujuan lanjut yang boleh dicapai jika penggantungan diberikan (lihat perenggan 16–17 & 20).]

Notes

For a case on stay of proceedings pending judicial review, see 2(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4328.

Cases referred to

Kerajaan Malaysia v Ekran Bhd [2006] 2 MLJ 746 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (folld)
Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd & Anor [1991] 4 All ER 65 (distd)
R v Secretary of State for Education and Science, ex parte Avon County Council [1991] 1 All ER 282 (folld)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 (not folld)
YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128 (folld)

Legislation referred to

Civil Procedure Code [Jamaica] s 564B(4)
Legal Profession Act 1976 s 46A
Rules of the Supreme Court [UK] O 53 r 3(10), O 53 r 3(10)(a)
Rules of the High Court 1980 O 53 r 3, O 53 r 3(5)

Walter Pereira (Kamaruddin & Partners) for the applicant.
Tommy Thomas (Tommy Thomas) for the respondent.

Lau Bee Lan J:

[1] The applicant, Nasioncom Holdings Sdn Bhd, through its ex parte application for judicial review under O 53 of the Rules of the High Court 1980 ('the RHC') dated 27 March 2007 (encl 1) sought leave for the following reliefs:

(a) for a writ of certiorari to quash the decision of the respondent, Securities Commission ('SC') dated 15 February 2007 in imposing a public reprimand ('first sanction') and to direct the applicant to rectify and reissue the applicant's 2005 financial statements by excluding from the group revenue of RM194,984,186, the sum of RM143,109,727 ('second sanction').

(b) an interim stay order of the two sanctions which the SC has imposed till the final determination of the ex parte application or of the substantive application.

(c) for a declaration that the decision of the respondent dated 15 February 2007 in imposing the two sanctions acted with mala fides and/or abuse of authority and/or did not act with fairness and was unreasonable and/or the Respondent was biased and acted in contravention of the basic rights of the applicant.

[2] Broadly, the background facts are as follows. The applicant was listed in 2005 on MESDAQ Market of Bursa Malaysia Securities Berhad and has an authorised share capital of RM100,000,000 of which RM80,000,000 is issued and fully paid-up as ordinary shares of RM0.10 each.

It is principally an investment holding company and the principal activities of its subsidiaries namely Nasioncom Sdn Bhd and Express Top Up Sdn Bhd ('ETU') are wholesale of telephony prepaid cards, retailing of telephony prepaid cards, provision of voice and data services, broadband internet access and information technology solutions to corporations and home users.

In May 2006, the applicant issued its first annual report for the financial year ended 31 December 2005 accompanied by the financial statements of the group and the company (exh TKS-1). After inspection and investigation conducted by the respondent's officers at its premises and various correspondences, the respondent was dissatisfied with the explanation proffered by the applicant with respect to the amounts of revenue of RM104.19m generated by ETU and RM90.89m generated by Nasioncom Sdn Bhd for the financial year ended 31 December 2005 which the respondent alleged to be false as per the show cause letter exh TKS-5. The applicant's contention was that they were actual sales and that a significant proportion of the trade receivables were collected by the end of the calendar year 2006 as per the applicant's reply letter, exh TKS-6. The respondent imposed the two sanctions as per exh TKS-7 (also exh SC-1). It is not disputed that leave to apply for an order of certiorari and declaration was obtained on 18 April 2007. With respect to the application for an interim stay order, the respondent opposed it and hence the subject matter of the hearing before me.

[3] The applicant in urging the court to grant interim stay principally on the ground that there are special circumstances relied on:

(a) The English position of O 53 r 3(10)(a);

(b) *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128 (HC);

(c) *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 (FC);

(d) *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 746.

[4] The respondent in urging the court to refuse the application argued on two grounds:

(a) the application for an interim stay as a matter of law is misconceived in that the phrase 'stay of proceedings' in O 53 r 3 of the RHC is confined to conduct of proceedings in court or before a tribunal and not a decision of a statutory body like the respondent where there is no proceedings involved. For support of this proposition, the Privy Council's case of *Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd & Anor* [1991] 4 All ER 65 and the case *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 (CA) were cited; and

(b) on the facts of the case itself, there is nothing to stay.

[5] It is common ground that the application for an interim stay order is premised on Order 53 r 3(5) of the RHC which reads:

> The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question

[6] As correctly pointed out by learned counsel for the applicant, Mr Walter Pereira, the English position as governed by O 53 r 3(10) Rules of the Supreme Court ('RSC') referred in *The Supreme Court Practice 1995* Vol 1 Pt 1 at p 842 is almost similar to our O 53 r 3(5) save for the fact that in England, the stay of proceedings is invariably automatic with a grant of leave for judicial review unless the court otherwise orders; whereas the Malaysian position is the converse. Order 53 r 3(10)(a) of the RSC provides:

> (10) Where leave to apply for judicial review is granted, then —
>
> (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders.

[7] With reference to the argument of learned counsel for the respondent, Mr Tommy Thomas, of importance is the phrase 'stay of proceedings' contained in O 53 r 3(5) of the RHC which he submitted has been interpreted to refer only to proceedings relied on what was held before a court

A or tribunal inferior and it does not extend to an executive decision which has already been made by a statutory corporation like the SC. In support Mr Thomas relied on what was held by the Privy Council in *Vehicles and Supplies Ltd* at p 66:

> B (3) A stay of proceedings was an order which put a stop to the further conduct of proceedings in court or before a tribunal at the stage then reached, the object being to prevent the hearing or trial taking place. As such it merely meant that any proceedings taking place while the stay was in force were ineffective and it was not an order enforceable by proceedings for contempt since by its nature it was not capable of being breached by anyone and thus could have no possible application C to an executive decision which had already been made. Furthermore, a stay could not act as an injunction by a sidewind. The judge when granting the ex parte stay of allocations had either granted relief which was inappropriate and inapplicable in the circumstances because there were no 'proceedings' on which a stay could take effect or sought to grant an injunction against the Mminister by inappropriate D means, but in either case the order was meaningless. The appeal would therefore be allowed and the order staying the allocations set aside.

[8] In order to comprehend the full import of the Privy Council's judgment in relation to the issue of stay of proceedings, the facts of the case as per the E headnotes is stated. The applicants, who were retail motor dealers in Jamaica, were aggrieved at a reduction in the allocation of imported motor vehicles made to them for the year 1988–1989 by the sole importer which was licensed by the Minister of Foreign Affairs, Trade and Industry to import motor vehicles into Jamaica. The importer Jamaica Commodity Trading C F Ltd ('JCTC') was a corporation owned or controlled by the Jamaican government and the allocation was made at the direction of the Minister. The applicants issued a summons for leave to apply for an order of certiorari to quash the allocations, alternatively an order of prohibition directed to the Minister prohibiting him from implementing the allocation or alternatively G an order of mandamus directing the Minister to make a fair allocation and further seeking an order that all allocations be stayed pending final determination of the proceedings. The judge in chambers made an ex parte order granting the relief sought including the stay of allocations. The applicants threatened to bring contempt proceedings against the minister if H any contract to import vehicles was concluded by the import corporation. The Minister applied for the order to be set aside on the grounds that the allocation had already been made and that well before the order was made by the judge instructions had been given to the import corporation to order vehicles. At the hearing of the minister's summons by another judge the stay I was lifted. On appeal by the applicants the Court of Appeal of Jamaica allowed the appeal and reimposed the stay. The Minister appealed to the Privy Council on four issues and one issue which is of relevance here is issue '(iii) whether a stay of proceedings which arose when leave was granted pursuant to s 564B(4) of the Judicature (Civil Procedure Code) Law of Jamaica to

apply for an order of prohibition of certiorari was in the nature of injunctive relief and, if so, whether injunctive relief could be granted against the Crown, and/or officers of the Crown'. The Privy Council answered in the negative whilst the second part of the issue is irrelevant for our purposes.

[9] Section 564B(4) of Jamaica Civil Procedure Code (the material part) provides:

> ... the grant of leave under this section to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders.

It is to be observed it is couched in almost similar fashion as Order 53 r 3(10)(a) of the RSC. The Privy Council's judgment on the concept of 'stay of proceedings' as I have adverted to earlier has in my view to be taken and seen in its context when at p 71 at para g–l through p 72 para a the Privy Council opined 'As it was there were no 'proceedings' in being upon which the 'stay' could take effect. Either Clarke J (first judge) was granting relief (stay) which was entirely inappropriate and inapplicable to the circumstances before him or he was seeking to enjoin the activities of JCTC, which was not a party to the earlier action'. Why? Prior to this it observed 'In the context of an allocation which had already been decided (by the Minister) and was in the course of being implemented by a person who was not a party to the proceedings (JCTC), it was simply meaningless. If it was desired to inhibit JCTC from implementing the allocation which had been made and communicated to it, or to compel the appellant (the Minister), assuming this was possible, to revoke the allocation or issue counter instructions, that was something which could be achieved by injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made'.

[10] In the instant case, the facts and circumstances are different. The SC is a party to the proceeding or action being the respondent. Unlike the Privy Council case, here the first sanction has been implemented by the SC ie, the public reprimand has already been made vide a press release made on 15 February 2007 (exh SC-2), a date before the filing of the application on 27 March 2007. As for the second sanction, it was argued on the respondent's behalf the time limit specified by SC to rectify and reissue its 2005 financial statements has expired, the deadline being 15 April 2007; hence since the applicant has failed to comply, 'there is nothing for the court to stay and the stay order sought is meaningless and is of no practical utility'. I am of the view that the contention of the respondent is flawed because as learned counsel for the applicant submitted, they filed the application for judicial review including stay on 27 March 2007 ie before the expiry of the deadline

for the compliance of the second sanction being 15 April 2007 and indeed, if the court is to adopt the respondent's argument, it will open the floodgates to parties to seek long dates and then turn around and say the applicant did not comply with an order or decision of the authority or body concerned.

[11] As for the case of *Sivarasa Rasiah*, Mr Thomas submitted that his application of stay pending the final determination of the proceedings was not granted by the High Court and the Court of Appeal on the premise that it was the Attorney General's Chambers' argument that there was no proceeding before the Bar Council as the applicant (Sivarasa Rasiah) was disqualified from holding office by an Act of Parliament (s 46A of the Legal Profession Act 1976) following the case of *Vehicles and Supplies Ltd*. However I cannot find such an argument canvassed in the body of the judgment; hence with respect I find the aforesaid case to be of no assistance in this matter.

[12] Having shown why I cannot accept the position taken by learned counsel for the respondent on the interpretation to be accorded to the phrase 'stay of proceedings', I now turn to the approach adopted by learned counsel for the applicant. In the case of *R v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282, the applicant council wished to reorganise secondary education in its area and applied to the Secretary of State for approval to do so. At the same time the governors of a school in the area, who were opposed to the council's plans, applied to the Secretary of State for grant-maintained status. The Secretary of State decided to reject the council's proposals and to approve the acquisition of grant-maintained status by the school and made an order giving it grant-maintained status. The council applied for leave to apply for judicial review by way of an order of certiorari to quash the Secretary of State's decisions and the order and also sought stay of the implementation of the order until the determination of the application. The judge granted the council leave to apply for judicial review but held that he had no jurisdiction to grant a stay of the implementation of the Secretary of State's decisions and the proposal for the school to become grant-maintained. The council appealed against the refusal of a stay (see headnotes). It is to be noted just like the contention of learned counsel for the respondent in the present case, the Secretary of State contended, inter alia, that although under O 53 r 3(10)(a) of the RSC the grant of leave to apply for judicial review operated as a stay of the proceedings to which the application relates it was only the proceedings of a court which were thereby stayed.

[13] The Court of Appeal held, inter alia, that r 3(10)(a) is not, as counsel for the Secretary of State held contended confined to cases where the judicial review application relates to judicial or quasi judicial proceedings, but enables the court to impose a stay on 'the process by which the decision challenged

has been reached, including the decision itself'. Thus, on the grant of leave to move for judicial review, the court has jurisdiction, where appropriate, to stay the decision making process (if it has not been completed), the decision itself and its implementation (see also the *Supreme Court Practice 1995* Vol 1 Pt 1 at p 863 para 53/1-14/27).

[14] At p 287 paras d–e, Taylor LJ made the following observation:

> The wording of RSC Ord 53, r 3(10) is in the widest terms. The introductory phrase 'Where leave to apply for judicial review is granted ...' appears to cover the whole field of judicial review. Had it been intended that 'the proceedings to which the application relates in sub-para (a) should refer only to judicial proceedings, one would have expected the curtailment to have been specified either in the introductory phrase or by qualifying the word 'proceedings' in sub-para (a).

[15] Hence I would like to adopt the dictum and apply it in the context of O 53 r 3(5) of the RHC in that the wording of O 53 r 3(5) has to have wider application and had it been intended that the proceedings to which the application relate 'should only refer to judicial proceedings', one would have expected the curtailment to have been specified by qualifying the word 'proceedings'. In fact the approach that the phrase 'a stay of proceedings' must have a wider application and is not confined in a court alone but is wide enough to encompass the categories alluded to above was taken by Ramly Ali J in *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Ja'afar*, with whose decision I agree, following *Secretary of State for Education and Science, ex parte Avon County Council*.

[16] It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O 53 r 3(5) of the RHC which states, 'The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question' is likewise discretionary.

[17] As to the proper exercise of this discretion, the court would need to consider whether there are special circumstances which warrant a stay of the proceedings. In this regard, support is drawn from the Federal Court case of *Kosma Palm Oil Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, which although is a case with respect to an application for stay of execution pending appeal, the principles as to what constitute 'special circumstances' would in my view, nevertheless apply. At pp 266F–267B. Augustine Paul JCA (now FCJ) after referring to various authorities in particular opined, 'The definition of special circumstances only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the

A opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion less of a discretion. This is surely not what discretion is all about'.

B **[18]** At p 268B–C, immediately after quoting *Re Kong Thai Sawmill (Miri) Sdn Bhd*. His Lordship further opined, 'It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact *that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances*'. (Emphasis added) (see *Ekran Bhd* C at pp 102–104).

[19] Reverting to the facts and circumstances of this instant case, it is the applicant's contention that compliance with the second sanction imposed by SC would cause:

D (i) in the event the financial statements for the year 2005 are reissued, the proceedings for a judicial review, would be academic and the applicant would suffer great damages (para 28 of the affidavit in support of Tham Kok Sing);

E (lcr) the payments received on account of these sales, which is the subject matter of judicial review herein, would amount to funds unaccountable for and affect investors' or shareholders' confidence (para 29 of the affidavit in support of Tham Kok Sing); and

(lcr) compliance would also prejudice the criminal proceedings against two F directors of the applicant on charges arising from the directive of the respondent to restate the applicant's annual audit accounts, (para 9 of Hiew Wei Pong's affidavit in reply).

[20] I am conscious of the averments made by Kiran Kaur Gill on behalf G of the respondent to the effect that SC should not be prevented from exercising its statutory duties. In my view that is the least the court wishes to do; at the end, the court is guided by the principle whether there are special circumstances which warrant a stay of proceedings being proven by the applicant. I find that the applicant has shown that it is indeed necessary to H grant a stay; however this will only apply to the second sanction but not to the first sanction pertaining to the press release which has already been carried out and there is no further purpose to be achieved if a stay is granted.

Application allowed for stay of sanction only.

I Reported by Dipendra Harshad Rai